IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-680

WALL STREET TRANSCRIPT CORPORATION and RICHARD A. HOLMAN,

Petitioners,

—vs.—

WAINWRIGHT SECURITIES INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Wall Street Transcript Corporation and Richard A. Holman, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on June 15, 1977, which affirmed the injunction issued by the District Court.

Opinions Below

The opinion of the Court of Appeals, Second Circuit, appended hereto, is reported in 558 F. 2d 91. The opinion of the United States District Court for the Southern District of New York, appended hereto, is reported in 418 F. Supp. 620. Jurisdiction of the District Court was based on the Copyright Act and under 28 U.S.C. § 1338.

Jurisdiction

The judgment of the Court of Appeals was entered on June 15, 1977. Appendix A, infra. A timely petition for rehearing (filed June 29, 1977) was denied on August 16, 1977. (Appendix A, p. 30a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. May a Court enjoin a newspaper and its editor, under the Copyright Act, in advance of publication, from exercising its First Amendment rights to report news stories on research reports which may be, but have not yet been, written by respondent and hence are not yet copyrighted, regardless of the newsworthiness of such research reports or of their impact on the general public?

2. Where the petitioners' newspaper and editor, have published brief accurate news stories on newsworthy research reports issued and copyrighted by the respondent, does the First Amendment require that the rights of the copyright proprietor be subordinated to the petitioners' right to publish accurate news stories on newsworthy

statements and the public's right to be informed about statements that have an impact on a large segment of the public?

Constitutional Provision and Statutes Involved

The pertinent constitutional and statutory provisions are set forth in Appendix B, infra (pp. 34a-36a).

Statement*

This is an action for an injunction, and ancillary relief under the Copyright Act, to enjoin the petitioners from distributing five issues of their newspaper with news stories on research reports issued and copyrighted by the respondent, and to enjoin the publication by petitioners, in the unlimited future, of news stories on any reports respondent might issue at any time in the future and then copyright. Both injunctions were granted.

The reports involved are stockbroker research reports, which are deemed important news because they often have significant economic or financial impact and hence impact the public generally (237a). The Court below noted that news stories on these reports appear in The Wall Street Journal (Appendix A, p. 11a).

The respondent is a major stock broker, regarded by many as one of the most important and powerful in the investment field (136a). It caters principally, if not exclusively, to some 900 large institutional investor clients including most of the major banks, insurance companies,

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* Figures in parentheses refer to pages in joint appendix in the Court below unless otherwise noted.

mutual funds and similar clients (6a). It prepares research reports on publicly traded companies which it copyrights and then provides to its 900 clients only (5a-6a).

Respondent appears to use inside corporate information in preparing its research reports; thus it describes its research reports as follows (6a):—

> "A Basic Report provides an in-depth study of a company with particular emphasis on current operations and the near-term and longer-range outlook, together with a review of the company's historical operating record. It contains sections concerning management, accounting policies, company and industry business characteristics, flow-of funds and balance sheet analysis, and dividend policy. *Basic Reports are based upon interviews with one or more company officials.* A Special Report generally concerns a major development at a company." (Emphasis supplied).

The respondent also says that all of such "sources of information" (132a), including of course the company officials provide "important inputs" to the reports (132a); and that the "Basic Reports" are circulated to company management for comment (133a).

According to respondent, the research reports are fundamental to the making of investment decisions. Indisputably the research reports are thus newsworthy. Thus respondent said (136a):—

> "The Research Reports are, in my opinion, the reason Wainwright is able to obtain and keep its institutional clients, which use the Research Reports *as fundamental input in their investment decision making process.* Indeed, for the past two years, Wainwright has had the largest number of securities

> analysts rated as outstanding by Institutional Investor magazine, the leading trade publication in the institutional investment field" (Emphasis supplied).

The petitioners are well described by the Court of Appeals as follows (Appendix A, pp. 2a-3a):

> "The Wall Street Transcript Corporation publishes the Wall Street Transcript ("Transcript"), a weekly newspaper concerned with economic, business, and financial news. The appellant Richard Holman is the chairman and sole stockholder of the publishing company, and has, apparently, editorial control of the newspaper. The Transcript's subscribers include colleges, libraries, lawyers, brokers, accountants and corporations. It is available to the public by subscription or at some newsstands."

The Transcript has been widely recognized as the newspaper where the public and individual investors may learn about important, impactful reports such as those issued by the respondent. Indeed, advertisements of the petitioners addressed to the public were headed "You Have a *Right* to Know" (164a).

On the other hand, before this suit started, respondent went on record that it would use the copyright laws to prevent the media from reporting to the public on respondent's reports (236a).

In the issues of the Transcript enjoined from distribution the news stories on reports issued by the respondent amounted to less than 1/1000 (one/one-thousandth) of the issue (233a).

The part published by petitioners was a relatively small part of the entire research report—thus the news account

of a seven page research report, consisted of nineteen lines (185a); the news account of a 26 page research report consisted of thirty-one lines (186a); the news account of a ten page research report consisted of twenty-seven lines (186a); the news account of a six-page research report consisted of 33 lines (186a); and the news account of a 41 page research report consisted of 36 lines (187a).

The District Court enjoined petitioners from further distribution of accounts published in the Transcript of five research reports previously copyrighted, and in addition enjoined petitioners from publishing accounts of research reports not yet written and hence never even copyrighted or read by the District Court (247a-8; 226a). The District Court dismissed the First Amendment as not really applicable to copyright matters because, said the Court, the doctrine of fair use has been precisely contoured to preclude any tension between the First Amendment and the copyright laws.

The District Court said in this respect (Appendix A, p. 21a):

> "The tension between the First Amendment and the copyright statute which the Transcript professes to discern in such cases as this does not exist. It does not exist because the doctrine of fair use, discussed below, has been precisely contoured by the courts to assure simultaneously the public's access to knowledge of general import and the right of an author to protection of his intellectual creation".

The precise contour of fair use which the District Court discerned is to be contrasted to the District Court's statement that the fair use doctrine is of "quicksilver content" (Appendix A, p. 23a). No matter how the issue is perceived fair use, which has now been codified (15 U.S.C. § 107), is no substitute for freedom of the press.

The Court of Appeals, in affirming the judgment of the District Court, purported to meet the First Amendment issue head on; although neither the District Court nor the Court of Appeals attempted to justify an injunction with respect to research reports not yet written and hence not yet copyrighted (Appendix A, pp. 1a-29a).

The Court of Appeals also indicated that fair use was a substitute for freedom of the press. The Court of Appeals said (Appendix A, p. 8a):

> "The question of the first amendment protections due a news report of a copyrighted research report is a provocative one. Conflicts between interests protected by the first amendment and the copyright laws thus far have been resolved by application of the fair use doctrine. E.G., *Walt Disney Productions* v. *Air Pirates*, 345 F. Supp. 108, 115 (N.D. Cal. 1972); *McGraw-Hill, Inc.* v. *Worth Publishers, Inc.*, 335 F. Supp. 415, 422 (S.D.N.Y. 1971). Some day, legitimate in-depth news coverage of copyrighted, small-circulation articles dealing with areas of general concern may require courts to distinguish between the doctrine of fair use and 'an emerging constitutional limitation on copyright contained in the first amendment'. Nimmer, *Does Copyright Abridge The First Amendment Guarantees of Free Speech and Press?* 17 U.C.L.A. L. Rev. 1180, 1200 (1970). *See* Patterson, *Private Copyright And Public Communication: Free Speech Endangered*, 28 Vanderbilt L. Rev. 1161 (1975). But, this is not the case."

The Courts below have held that they may dictate to the press, in advance of publication, what news and edi-

torial matter it may or may not publish. These rulings disregard the important newsworthiness of the material already issued by respondent. The Court-imposed ban on publication of stories about reports which the respondent may make in the future is applicable regardless of the newsworthiness of the statements contained therein or the wide-spread impact or repercussions the statements made may thereafter have on the public.

These rulings go to the very heart of news reporting which consists, primarily in reporting to the public what someone has said. Since the Courts below have said that practically any written matter may be copyrighted (Appendix A, p. 19a), the implications of the holdings below on the First Amendment rights of the press to report on important newsworthy matter can be devastating if the copyright laws can be utilized to prevent news reporting. The decisions of the Courts below will most certainly have a "chilling" effect on the First Amendment rights of the petitioners and of the press when faced with the dilemma of how to report on a highly newsworthy statement that bears a copyright label.

While the question of the rights of the press to report on newsworthy statements despite objections by the news source has been alluded to in at least one recent decision of this Court, the question of the proper balance between the First Amendment rights of the press, including the public's right to know, and the rights of copyright proprietor have never been determined by this Court.

The Court of Appeals laid down a standard which, if it remains as controlling authority, effectively bars any news reporting on a copyrighted statement, no matter how newsworthy that statement may be. The Court of Appeals set forth a list of what the press cannot report (Appendix A, pp. 8a-9a):

> "What is protected is the manner of expression, the author's analysis or interpretation of events, the way he structures his material and marshalls facts, his choice of words, and the emphasis he gives to particular developments".

If the Press is required to eliminate all of the foregoing from a news story on an important statement, there is then no meaningful reporting at all. There is only watered down reporting which is utterly uninformative to the publice and is not the kind of news reportage that the First Amendment is meant to foster.

Moreover, most news in the economic, business and financial field consists of stories of what someone has said rather than of what somebody did. The Court of Appeals would in effect permit the copyright laws to prevent publication of such news, especially if the press sought to publish the important parts of what was said. The Court of Appeals would virtually limit the press to reporting that a person made a statement on a particular subject without any reporting of the essential elements of the statement (Appendix A, p. 8a). That is utterly inconsistent with what this Court has ruled was the essence of legitimate journalism in *Time, Inc.* v. *Pape,* 401 U.S. 270 (1971). In *Pape,* this Court pointed out that much, if not most, news consists of what somebody has said and that direct quote from the news source was probably the best and safest course of journalism. This Court there said (p. 285):—

> "But a vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what anybody *did.* Indeed, perhaps the largest share of news concerning the doings of government appears in the

form of accounts of reports, speeches, press conferences, and the like. The question of the 'truth' of such an indirect newspaper report presents rather complicated problems.

A press report of what someone has said about an underlying event of news value can contain an almost infinite variety of shadings. Where the source of the news makes bald assertions of fact—such as that a policeman has arrested a certain man on a criminal charge—there may be no difficulty. But where the source itself has engaged in qualifying the information released, complexities ramify. Any departure from full direct quotation of the words of the source, with all its qualifying language, inevitably confronts the publisher with a set of choices."

It is, inter alia, because much, if not most news, consists in reporting what someone has said that the First Amendment right of the press to report news and the public's right to know cannot be subordinated to the property rights created by the copyright laws, or else the free press becomes meaningless and the public remains uninformed.

Reasons for Granting the Writ

Question No. 1

The Courts below ruled that the copyright laws authorize a prior restraint upon the publication of news accounts or abstracts of matter not yet written and hence not yet copyrighted. No one can tell how newsworthy the matter may be when it is written, nor the impact such matter may have upon the public. Indeed, the respondent claims that

all of its research reports are basic to decision making by its 900 clients (136a). Hence it must be assumed that these unwritten reports will be newsworthy and also be basic to decision making when, as and if written. The decisions below thus esconced prior restraints against the press to an absolute zenith.

The copyright laws are certainly no different from any other statute when weighed against the First Amendment. The Constitution (Art. 1, Sec. 8) grants no rights to authors; it merely authorizes Congress to enact copyright laws and necessarily the power vested in Congress is subjected to and cannot impinge upon First Amendment rights.[1] So far as copyright laws are concerned the Constitution is permissive, not mandatory.[2] On the other hand this Court guards the First Amendment "with a jealous eye".[3]

But the Courts below have ensconced the copyrights laws above other statutory rights. They have not guarded the First Amendment with a jealous eye, and when confronted with a direct tension between the First Amendment and a mere statute, they opted for the statute.

The judgment of the Court below is particularly dangerous because it not only vitiates the right of the Press to report the news, but it strikes at the economic well-being of some 25,000,000 direct individual shareholders and

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[1] *Wheaton* v. *Peters*, 33 U.S. 591, 661, 663 (1834); *Mazer* v. *Stein*, 347 U.S. 201, 214 (1954); *Krafft* v. *Cohen*, 117 F. 2d 579, 580 (2 Cir. 1941).

[2] *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U.S. 518, 530 (1972).

[3] *A.F.L.* v. *Swing*, 312 U.S. 321, 335 (1941).

countless other millions who are affected by economic conditions. It jeopardizes this nation's free enterprise system by destroying public access to statements that have a direct and important impact on them.

The dangerous impact of the judgment below is summed up by the leading news columnist for the Wall Street Journal who was quoted in "Editor and Publisher", the bible of the press, as commenting on the Court of Appeals' opinion less than two weeks after it was handed down: "I don't see how you can have any reports that are proprietary if they have an impact on the investing public" (Editor and Publisher June 25, 1977, p. 7).

Editor and Publisher had previously editorialized against the use of the copyright laws to prevent dissemination of news. (See editorial entitled Copyright and news reporting, Editor, and Publisher, April 16, 1977, p. 6).

A few days later on June 30, 1977 the Wall Street Journal (p. 35) carried a long news story on one of respondents' copyrighted research reports, as to which the petitioners were enjoined from publishing even before respondent wrote the research report (Appendix C).

The respondent asserts that its research reports are fundamental to the making of important economic decisions by its 900 large clients (136a). But limiting this important news to those chosen few, constitutes a clear danger to this nation's economic system. Indeed, Mr. James W. Davant, Chief Executive Officer of one of the largest investment banks and brokerage firms pointed out in a speech entitled: "Free Marketing and the Individual Investor" (Transcript, Nov. 14, 1977, pp. 48, 816). "More and more individual investors see the market as a playground of the powerful few". The judgment of the Court below can only reinforce and justify that belief which is

so dangerous to this nation's economic health. In short, the copyright laws cannot be permitted to be utilized so that there is an informed powerful few and an uninformed general public, thereby destroying confidence in this nation's entire economic system.

Moreover the injunction sweeps unwritten and uncopyrighted matter under the protection of the copyright laws irrespective of its news content or importance to the general public and irrespective of whether or not it may properly be the subject of copyright. We submit that never before have the copyright laws been so extended nor has the First Amendment ever been so cavalierly treated.

This prior restraint as to unwritten and uncopyrighted matter comes before this Court with a heavy presumption against its constitutional validity. As this Court has repeatedly ruled.[4]

> "'Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity' [citations omitted].
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> "'It is elementary of course, that in a case of this kind the courts do not concern themselves with the truth or validity of the publication. Under *Near* v. *Minnesota*, 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. 623 (1931), the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights".

The thesis of the Courts below that somehow the copyright laws escape the mandate of the First Amendment

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[4] *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 418 (1971); see also: *Near* v. *Minnesota ex rel Olson*, 283 U.S. 697, 713 (1931).

because of the illusory and quicksilver content of the doctrine of fair use simply will not square with the First Amendment and this Court's guarding of the same. The purpose of the First Amendment is to preserve an uninhibited market place of ideas in which truth will ultimately prevail; it preserves inviolate the right of the public to all sorts of information, political, social and economic, especially where, as here, the economic news is concededly fundamental in decision-making and has public impact.[5]

This is a nation which still adheres to a free enterprise economy. The allocation of its resources and the political implications thereof still rest in large measure on numerous private economic decisions. It is a matter of public interest that these decisions be intelligent and well informed.[6] And as this Court made clear in *Virginia Consumers*, since the allocation of resources depends upon a free flow of economic information, necessarily that same information is essential to a determination of how this nation's political institutions should be regulated.

When statements are made by powerful people; when these statements can and do have major impact on millions of people, the statements are highly newsworthy and the public has a right to know about them. And the Court cannot, as both courts did here, "escape the task of assessing the First Amendment interest at stake . . ." *Linmark Associates Inc.* v. *Willingboro,* —— U.S. ——, 52 L. ed. 2d 155 at 161 (1977).

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[5] *Red Line Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 390 (1969); *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303, 311 (2 Cir. 1966) cert. den. 385 U.S. 1009 (1967).

[6] *Virginia State Board of Pharmacy* v. *Virginia Consumers Council*, 425 U.S. 748 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975); *Linmark Associates Inc.* v. *Willingboro,* U.S. , 52 L. ed. 2d 155 (1977).

This Court has struck down time and again statutes or rules which impinged upon the public's right to know.[7] The mere fact, if it be a fact, that petitioners published accounts of respondent's research reports in order to sell their newspaper, as the Court below indicated (Appendix A, p. 12a) is wholly irrelevant. The respondent claims that it copyrights its research reports for monetary gain (6a), and that too is wholly irrelevant.

Obviously every newspaper is published in the hope of making a profit through sales and advertising; and lawyers and others advertise for the same purpose. Yet where, as here, the matter published is newsworthy or has public impact, the fact that it is commercial speech in which the petitioners have an economic interest does not withdraw the same from First Amendment protection.[8]

The competing interests here are respondent's desire to profit through its research reports and against that stands the freedom of the press and the general public's right to know what is impacting the public. Under such circumstances respondent's desire must yield to the First Amendment's virtually insurmountable barrier between government and the press and the consumers need for the free flow of news and commercial information; and the copyright laws thus cannot stand athwart the First Amendment.[9]

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[7] *Bates* v. *State Bar of Arizona,* U.S. , 53 L. ed. 2d 810 (1977); *Buckley* v. *Valeo*, 424 U.S. 1 (1976); *Smith* v. *California*, 361 U.S. 147 (1959).

[8] *Bates* v. *State Bar of Arizona,* U.S. , 53 L. ed. 2d 810 (1977).

[9] *Bates* v. *State Bar of Arizona,* U.S. , 53 L. ed. 2d 810 (1977); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969); *Linmark Associates, Inc.* v. *Willingboro,* U.S. , 52 L. ed. 2d 155 (1977); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 259 (concurring opinion) (1974).

Respondent has shown nothing, and neither have the Courts below, to overcome the heavy presumption against the constitutionality of the prior restraint barring the petitioners from publishing accounts of unwritten, and thus uncopyrighted, research reports. At this point in time, no one can tell how newsworthy or important those unwritten research reports may be. However, respondent claims that all of its research reports are fundamental to the making of important economic decisions by the 900 chosen few. Taking respondent at its word, it is obvious that the same research reports have major public impact and the public is entitled to take this into account. The petitioners thus are serving the highest societal interest in assuring informed and reliable decision making, by publishing to the world the analyses and conclusions contained in the research reports.

The copyright laws are no more or less constitutionally permissible than any other statute designed to impede the free flow of information. None of these statutes has as yet been sustained by this Court especially where, as here, it is conceded that the restraint operates against the publication of material fundamental to important decision making. We submit that the Courts below have gone against the main stream of constitutional decisions of this Court; that the Courts below have established a dangerous precedent which seriously impedes the free flow of essential information; that the Courts below have extended the copyright laws beyond their constitutional limitations and that it is utterly essential at this time that this Court limit the copyright laws to their proper place in this nation's economy.

Neither of the Courts below referred to *Miami Herald Publishing Company* v. *Tornillo*, 418 U.S. 241 (1974) although that unanimous decision of this Court expressed in a series of three separate opinions, makes it crystal

clear that the Government cannot become involved in tampering with the content, the layout, or anything else involving the judgment of the Press. In short, as Mr. Justice White pointed out, concurring.[10]

> "According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned. *New York Times Co.* v. *United States*, 403 U.S. 713, 29 L Ed 2d 822, 91 S Ct 2140 (1971). A newspaper or magazine is not a public utility subject to 'reasonable' governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed."

And Mr. Chief Justice Burger, delivering the opinion of the Court pointed out.[11]

> "Compelling editors or publishers to publish that which 'reason' tells them should not be published' is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 244-245, 80 L Ed 660, 56 S Ct 444 (1936). The Florida statute exacts a penalty on the basis of the content of a newspaper".

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[10] *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 at p. 259.

[11] *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 at p. 256.

And the Chief Justice quoting from *Pittsburgh Press Co.* v. *Human Relations Comm'n,* 413 U.S. 376 (1973) made it very clear that no law an impose any restraint whatsoever whether of content or layout on stories or commentary of the press. The Chief Justice there said.[12]

> "'Nor, a fortiori, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial.'
>
> "Dissenting in *Pittsburgh Press,* Mr. Justice Stewart, joined by Mr. Justice Douglas, expressed the view that no 'governmental agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot.'"

There is nothing of societal interest in limiting this important economic news to the chosen few. There is no reason why the copyright laws may be utilized to give important advantages to a chosen few.

Question No. 2

The Courts below enjoined petitioners from further publication of accounts of five research reports which had been copyrighted. In doing so the Courts below overrode petitioners' arguments that the research reports were newsworthy, fundamental to the making of important

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[12] *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 at pp. 255-6.

economic decisions, and that the copyright laws must accordingly yield to the command of the First Amendment. Both of the Courts below thought that the elusive and quicksilver doctrine of fair use was an adequate substitue for the First Amendment protections.

We submit that the copyright laws were not designed to frustrate the right of the public to be informed of important matters which are fundamental to the making of informed economic decisions; that public welfare is not advanced by giving copyright protection to these research reports; and that the Courts below ensconced the copyright laws to a status superior to that of the First Amendment.

This Court has made it clear that the purpose of the copyright laws is to encourage new effort by personal gain to advance public welfare through the talent of authors and inventors in science and useful arts; that the reward to the copyright owner is only a secondary consideration; and that the copyright laws were designed to afford greater encouragement to the production of works of benefit to the public.[13]

But it is obvious that limiting the distribution of these research reports to the chosen 900 could not possibly in any way advance public welfare or benefit the public. To the contrary, the limitation of this matter fundamental to decision making (as respondent asserts), to the chosen 900 is detrimental to the public welfare and of no benefit whatsoever to the public. It is thus clear that the Courts below have permitted respondents to utilize the copyright laws for an improper purpose, not authorized by the Constitution.

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[13] *Zacchini* v. *Scripps-Howard Broadcasting Co.,* U.S. , 53 L. ed. 2d 965 (1977).

The essential difference between the situation at bar and that which existed in *Zacchini* is that at bar the public is deprived of knowledge about what these research reports say which have a direct and important impact on the public, while in *Zacchini* there was no such deprivation. Nonetheless, three Justices of this Court indicated that the complete appropriation of Zacchini's act was proper in the light of the First Amendment. And no prior restraint was sought in *Zacchini*; all that was sought there was money damages.

The majority in *Zacchini* appropriately noted that entertainment, as well as news, enjoys First Amendment protection and that entertainment itself can be important news. Here, the Court does not have to search for any rationale of the newsworthiness of respondents' research reports for respondent itself has declared that its research reports are fundamental to the making of important investment decisions with resulting public impact (136a).

The issue which is directly raised here was alluded to but not directly involved in the *Zacchini* case. *Zacchini* involved the reach of a state law right of publicity which this Court said was closely analogous to the goals of patent and copyright law. While this Court said that it would protect an entertainer against television broadcasting of his entire act, nonetheless this Court noted.[14]

> "It is evident, and there is is no claim here to the contrary, that petitioner's state law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about petitioner's act".

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[14] *Zacchini* v. *Scripps Howard Broadcasting Co.*, —— U.S. ——, 53 L. ed. 2d 965, 976 (1977).

It is reports by brokers, few of whom are as important and powerful as respondent, that have direct impact on millions of individual investors and the public generally. Palpably, the right of the public to be fully informed of such important economic news is far superior to the right of the public to view for free on television Zacchini's act. Zacchini did not claim that his act had impact on the economic life and strength of this nation; but at bar the respondent must concede that its research reports have widespread public impact. They are thus newsworthy in their entirety and hence the very reason why this Court protected Zacchini's entire act is absent here. This Court made it clear that the right of publicity could not bar reporting the newsworthy facts about Zacchini's act and by the same token the copyright laws cannot be utilized to prevent the press from publishing brief news stories of these reports.

The District Court indicated (Appendix A, p. 20a) that perhaps the petitioners could publish that the respondent had issued a report on a particular company and perhaps whether it was favorable or unfavorable, bullish or bearish.

But that watered down reporting is utterly uninformative to the public and is hardly the kind of news reportage that the First Amendment is meant to foster.[15] This Court has made it clear that the editorial policy of a newspaper and what it does or does not publish is of no concern to the Courts. A statute may not exact a penalty on the basis of the content of a newspaper and yet that is precisely what the Courts below have held the copyright laws may do. Accordingly, the decisions of the Courts

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[15] *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 257-8 (1974).

below are squarely in conflict with an unbroken line of authority laid down by this Court.[16]

It is this aversion of this Court to telling a newspaper in advance what it can or cannot print which has permeated this Court's decisions that prior restraints are anathema to the First Amendment. No doctrine of fair use or any other doctrine can immunize a statute from the mandate of the First Amendment. Commercial and economic news is the core of this nation's free enterprise system. The system itself cannot survive in the absence of an informed general public especially where, as here, there has been carved out from the general public a miniscule class which is informed to the detriment of the general public which bears the brunt of the impact.

The Courts below have treated the copyright laws as though they were sacrosanct; and they have likewise treated the petitioners as though they were a public utility subject to reasonable governmental regulation in matters affecting the exercise of journalistic judgment as to what shall or shall not be printed. The mere fact that respondent may have some sort of a proprietary interest in its copyrighted matter cannot bar the press from informing the general public.[17]

The Court of Appeals misapprehended what it referred to as traditional news coverage (Appendix A, p. 9a). The Court of Appeals said that unlike traditional news coverage, the petitioners did not provide independent ana-

[16] *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256 (1974); *Mills* v. *Alabama*, 384 U.S. 214 (1966); *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U.S. 376, 391 (1973).

[17] Cf. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 259, Concurring Opinion (1974).

lysis or research nor did they solicit comments on the same topics from other financial analysts and they did not include any criticism, praise or other reaction by industry officials or investors. Rather, said the Court below, the petitioners appropriated almost verbatim the most creative and original aspects of the research reports, viz the financial analyses and predictions (Appendix A, p. 9a).

The Court below simply did not understand how a newspaper works. Much of what is reported in the daily press, as this Court has heretofore noted, is what is said rather than what is done.[18] When the press reports what someone has said, it does not normally solicit comments on the same topics from others nor does the press usually criticize, praise or print other reaction to what has been said. To the contrary, the safest and best form of reporting is to print verbatim that which has been said.[19]

Moreover, under the Court of Appeals' thesis, the petitioners would be required to publish matters which they did not wish to publish in order to give validity to that which they do publish. This is like saying that because a newspaper publishes critical comment about a politician, it can be required to publish comment favorable to that politician. But as this Court squarely held any such requirement runs afoul of the First Amendment.[20]

In short, as this Court has made clear, it is a function of the newspaper, and not of the Courts, to determine what it will or will not print. If a newspaper must print two sides of every question; and must seek the reaction of

[18] *Time, Inc.* v. *Pape*, 401 U.S. 279, 285-6 (1971).

[19] *Time, Inc.* v. *Pape*, 401 U.S. 279, 286 (1971).

[20] *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).

others to the statements it does print; then the free press as it has been traditionally known in this country will no longer exist.

To exacerbate the situation, the respondent did not adduce a scintilla of evidence to show that petitioners' publication of the news accounts of respondent's research reports in any wise impaired the value of its research reports. To the contrary, the respondent asserted that it derived approximately 90% of its revenues and an even greater percentage of its profits from its institutional research operation (6a); that it was impossible to determine how much business, if any, respondent lost because of petitioners' news accounts (137a); that respondent had no idea whether any of its institutional clients gave business to other brokerage houses because they were upset about petitioners' publications of the accounts (137a); nor did the respondent have any idea how many, if any, potential customers used the petitioners' accounts as the basis for investment decisions (137a).

In short, there is absolutely no evidence that the petitioners' news accounts in any way affected the value of respondent's research reports, qua research reports, or as a means of obtaining business. Indeed, there is evidence that the news accounts published by the petitioners may have actually increased the demand for the original research reports (187a-188a).

Thus, First Amendment rights and the public's right to know have been swept within the main of the copyright laws on the basis of pure surmise and conjecture that untoward consequences may result from the petitioners' publication of the news accounts of respondent's research reports. That is no basis upon which to elevate a purely statutory right to a status free of the First Amendment. Although that publication might, or may or could prejudice a proprietary interest or even the right to a fair trial that is not enough to permit the Courts to shrug off the mandate of the First Amendment.[21]

Certainly, the New York Times did not come before this Court with clean hands in connection with the Pentagon Papers. Certainly the Pentagon Papers were not prepared with the thought in mind that they would be published to the world, especially when they were obtained by devious means at best. Yet this Court made it clear that where disclosure would not surely result in direct immediate and irreparable damage, the command of the First Amendment barred any type of injunction. The copyright laws can reach no higher. They too must yield to the command of a free press.

The petitioners are not in any way in competition with the respondent. The petitioners are in a business which in no wise impinges upon the respondent's business. The petitioners had no axe to grind, no malevolent purpose in mind, in publishing the accounts of respondents' research reports (180a-185a, 190a-191a).

To the contrary, the petitioners were fulfilling the most sacred functions of the press. They were supporting the economic laws of this nation which are based on the concept of full disclosure; full disclosure to everyone; not full disclosure to a chosen few. There is a strong public policy against limiting disclosure to a chosen few and to the detriment of the general public. The private interest of the respondent, asserted under the copyright laws, in limiting the audience to this vital information to its institutional clients, 900 in number, simply cannot prevail against the public's right to know. The public interest must

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[21] *New York Times* v. *United States*, 403 U.S. 713, 725, 730 (1970); *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976).

prevail, and anyone including these petitioners, has a right to assert that public interest.[22]

This case thus poses the issue of a direct confrontation between the First Amendment and the copyright laws. This Court has never decided that precise question. Yet, it clearly appears from the trend of this Court's decisions that the Courts below are wrong and have emasculated First Amendment freedoms, and the public's right to know, which this Court has said is vital to the maintenance of this nation's free enterprise system.

CONCLUSION

In sum, we have a case failing to vindicate constitutional promises and relegating to an inferior status First Amendment freedoms and the public's right to know. This case introduces far-reaching innovations in the sweep of the copyright laws and ensconces the copyright laws in a privileged position superior to the First Amendment. The decisions below appear to be in conflict with decisions of this Court on the same matters and with respect to important constitutional questions which have not been but should be settled by this Court. Moreover, the sweep of the decisions below are in conflict with applicable standards announced by this Court.

The decisions below are extremely dangerous precedents. They could severely curtail that freedom of the press which is essential to a republican form of government. It was not by chance that freedom of the press was embraced within the First Amendment to the United States

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[22] *Harrisonville* v. *Dickey Clay Co.*, 289 U.S. 334, 338 (1933); *Virginia Ry.* v. *Federation*, 300 U.S. 515, 552 (1937).

Constitution. The Courts below have failed to give full faith and credit to the intent of the First Amendment; they have shrugged off freedom of the press and the public's right to know as though it were a secondary standard limited by the copyright laws rather than the other way around.

Dated: New York, N.Y.
November 11, 1977

Respectfully submitted,

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Certification of Service

I, Samuel N. Greenspoon, counsel for petitioners in the foregoing petition for a writ of certiorari, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 11th day of November, 1977, I served copies of the foregoing petition for a writ of certiorari on Wainwright Securities, Inc., Respondent, by causing copies thereof to be mailed in duly addressed envelope, with postage prepaid, to Cahill, Gordon & Reindel, attorneys for the respondent, 80 Pine Street, New York, New York 10005.

Dated: November 11, 1977

SAMUEL N. GREENSPOON
Counsel for Petitioners

APPENDIX A

Relevant Opinions

WAINWRIGHT SECURITIES INC.,

Plaintiff-Appellee,

v.

WALL STREET TRANSCRIPT CORPORATION and Richard A. Holman,

Defendants-Appellants.

No. 937, Docket 76-7468

United States Court of Appeals,
Second Circuit.

Argued April 27, 1977.

Decided June 15, 1977.

Eaton, Van Winkle, Greenspoon & Gutman, New York City (Samuel N. Greenspoon, New York City, of counsel), for appellant Wall Street Transcript Corp.

Richard A. Holman, pro se.

Cahill, Gordon & Reindel, New York City (Roy L. Reardon, Stephen A. Greene, Ira A. Finkelstein, Helene Fromm, New York City, of counsel), for plaintiff-appellee.

Before Medina, Oakes, Circuit Judges, and Mishler, District Judge.*

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* Of the United States District Court for the Eastern District of New York, sitting by designation.

Appendix A

Mishler, District Judge.

This is an appeal from a preliminary injunction entered in the Southern District of New York, prohibiting the defendants-appellants, the Wall Street Transcript Corporation and Richard A. Holman, from publishing in their newspaper abstracts of plaintiff-appellee's copyrighted research reports.

The plaintiff-appellee H. C. Wainwright & Co. ("Wainwright") is a Massachusetts limited partnership, organized in 1868, that is engaged in the institutional research and brokerage business. While the company is registered as a broker-dealer with the Securities and Exchange Commission, Wainwright's specialty, from which it derives most of its profits, is the preparation of in-depth analytical reports on approximately 275 industrial, financial, utility and railroad corporations. These reports, written by analysts employed by Wainwright, examine a company's financial characteristics, trends in an industry, major developments at a company, growth prospects, and profit expectations, and highlight both corporate strengths and weaknesses. The analyst's conclusions and predictions are a major feature of the reports.

Often, a research report requires several months of an analyst's time, some of which is spent interviewing the officials at the company. The reports, which may run as many as 40 pages in length, are used by more than 900 Wainwright clients, including major banks, insurance companies and mutual funds. Wainwright copyrights its reports in accordance with the Copyright Act, 17 U.S.C. §§ 1 *et seq.* (1970 & Supp. 1975).

The Wall Street Transcript Corporation publishes the Wall Street Transcript ("Transcript"), a weekly news-

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paper concerned with economic, business, and financial news. The appellant Richard Holman is the chairman and sole stockholder of the publishing company, and has, apparently, editorial control of the newspaper. The Transcript's subscribers include colleges, libraries, lawyers, brokers, accountants and corporations. It is available to the public by subscription or at some newsstands.

One of the Transcript's major features is the "Wall Street Roundup," a column consisting almost exclusively of abstracts of institutional research reports.[1] Indeed, in advertisements in such publications as Barron's, the Transcript promises readers "a fast-reading, pinpointed

[1] The following is a typical abstract by appellants of a Wainwright report, published in the Wall Street Transcript on May 10, 1976:

> W. D. Williams of H. C. Wainwright & Co. says in a Speciai Report (April 13—7 pp.) on FMC Corp. (25) that 1976 prospects are strengthened by the magnitude of the increase in industrial and agricultural chemical earnings in last year's recessionary environment. And second, he says that likely to aid comparisons this year was the surprisingly limited extent to which the Fiber Division's losses shrank last year.
>
> His estimated earnings for 1976 is $3.76 per share compared with earnings of $3.24 per share in 1975.
>
> According to Williams, one of the most hopeful developments in recent years was the decision by management last year to attempt to negotiate sale of the Fiber Division. He says the company could wind up with possibly $100 million, plus a tax writeoff and a sizable one-time charge against earnings. And, concerning the tanker situation, he writes that the company is now far enough along on the learning curve that additional cost overruns, if any, will be small, the major incremental financial cost to FMC will lie in the determination of what share of the present unreserved overrun is the company's responsibility (27a).

account of heavyweight reports from the top institutional research firms." (162a).

In 1974, the Transcript began publishing abstracts of Wainwright's search reports. In April, 1976, Wainwright began copyrighting its reports but, despite protests. Transcript continued to publish the abstracts in the Wall Street Roundup. On July 9, 1976, Wainright began an action pursuant to the Copyright Act, 17 U.S.C. §§ 1 *et seq.*, alleging copyright infringement and unfair trade practices, and seeking injunctive and monetary relief. On August 19, 1976, after a hearing, Judge Lasker granted Wainwright's motion for a preliminary injunction. 418 F. Supp. 620 (S.D.N.Y. 1976). We affirm.

[1-4] In this circuit, a preliminary injunction can be granted if plaintiff shows irreparabble injury, combined with either a probability of success on the merits, or a fair ground for litigation and a balance of the hardships in his favor. *See Sonesta International Hotels Corp.* v. *Wellington Associates,* 483 F.2d 247, 250 (2d Cir. 1973). In copyright cases, however, if probable success—a prima facie case of copyright infringement—can be shown, the allegations of irreparable injury need not be very detailed, because such injury can normally be presumed when a copyright is infringed. *Robert Stigwood Group Ltd.* v. *Sperber,* 457 F.2d 50, 55 (2d Cir. 1972); *American Metropolitan Enterprises of New York* v. *Warner Bros. Records,* 389 F.2d 903, 905 (2d Cir. 1968); *Uneeda Doll Co.* v. *Goldfarb Novelty Co.,* 373 F.2d 851, 852 n.1 (2d Cir. 1967); *Joshua Meier Co.* v. *Albany Novelty Manufacturing Co.,* 236 F.2d 144, 147 (2d Cir. 1956); *Rushton* v. *Vitale,* 218 F.2d 434, 436 (2d Cir. 1955) (Clark, *J.*); see 2 *Nimmer on Copyright* § 157, at 698.4 n.177 (1976 & Supp.). Wainright's claim that most of its profits derive

from its reports, and Judge Lasker's finding that publication of the extracts "may materially reduce the demand for Wainwright's services," sufficiently show irreparable injury under this standard. We need only consider, then, whether a prima facie case of infringement has been made out. Since Wainwright's reports were copyrighted and since no permission was given for publication of the reports in abstract form, a critical question in determining the existence of a prima facie case is whether the Transcript made "fair use" of the Wainwright reports. *See* 2 *Nimmer on Copyright* § 45 (1976).

[5] The doctrine of fair use creates a privilege "in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner. . . ." *Rosemont Enterprises, Inc.* v. *Random House, Inc.,* 366 F.2d 303, 306 (2d Cir. 1966), *quoting* Ball, *Copyright and Literary Property* 260 (1944). For example, a classic illustration of fair use is quoting from another's work in order to criticize it. The principle has most often been applied to works in the fields of science, law, medicine, history and biography. The fair use doctrine offers a means of balancing the exclusive rights of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern, such as art, science and industry. Put more graphically, the doctrine distinguishes between "a true scholar and a chiseler who infringes a work for personal profit." Hearings on Bills for the General Revision of the Copyright Law Before the House Comm. on the Judiciary, 89th Cong. 1st Sess., ser. 8, pt. 3, at 1706 (1966) (Statement of John Schulman).

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Judge Lasker found that the Transcript's abstracts did not constitute a fair use of the Wainwright reports because (1) the takings were "substantial in quality, and absolutely, if not relatively substantial in quantity," 418 F.Supp. at 625; (2) publication of the abstracts probably reduced the value of Wainwright's research reports; (3) the public interest in dissemination is not affected since the Transcript is not restrained from researching and preparing its own reports; and (4) such reports could be prepared from original materials. *See Marvin Worth Productions* v. *Superior Films Corp.*, 319 F.Supp. 1269, 1274 (S.D.N.Y. 1970).

On this appeal, appellants argue, as they did before the district court, not only that their use of the reports was a fair one, but that publication of the abstracts of the reports is simply financial news coverage entitled to the protection of the first amendment. They point out that Wainwright reports have been reported as news events by the Wall Street Journal and that these accounts include the analyses and conclusions of the original reports.[2]

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[2] According to appellants, the following excerpts appeared in an article in the Wall Street Journal on August 22, 1975:

> "Earlier estimates of a full industry profit recovery in 1976 now seem too optimistic" says Daniel W. Starrett, of H. C. Wainwright & Co., "and the horizon on such a development has probably been pushed into 1977." His views were in a special report to clients that reviewed first half results of six major steel companies.
>
> Mr. Starrett sees uneven results flowing from recently announced price increases, which center on the 3.8% average

(Footnote continued on following page)

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> increase set by U.S. Steel. The decision by U.S. Steel to delay price increases on sheet and strip products until Oct. 1, he says, suggests increased pressure on profits of most other steel companies in the current quarter.
>
> Although the analyst is basing his current estimates for the six companies on the assumption that the 3.8% price boost can be realized over the rest of this year, he terms it a "shaky" assumption.
>
> "The profit outlook for the remainder of the year remains rather cloudy. With future pricing perhaps the greatest area of uncertainty," he says.
>
> "Cost increases and sharply reduced operating rates will clearly require some relief if the industry's near-term profit viability is to be maintained. The extent to which pressure from cut-rate imports and reduced demand will limit or prevent improved price realization cannot be gauged with any confidence."
>
> Mr. Starrett estimates that industry shipments this year will drop to 84 million tons.
>
> Although he believes industry volume could rebound 10% or more next year, he doesn't expect supplies to be tight.
>
> "Although cost-price relationships will be the ultimate determinant, it seems unlikely at this early date that industry profits will return to peak 1974 levels next year," he says.
>
> "In the interim, the odds appear to favor more bad news. In general, while quarterly dividend rates don't appear to be in jeopardy, the extra payments adopted by all but U.S. Steel in 1974 might be reduced or eliminated."
>
> Mr. Starrett's estimates of per-share net this year: U.S. Steel $8.50 vs. $11.52 in 1974; Bethlehem $5 vs. $7.85; Armco $4 vs. $6.71; Inland $5.50 vs. $7.96; National $3.50 vs. $9.44; and Republic $6 vs. $10.55. His U.S. Steel estimate includes 82 cents per share earned in the first quarter from sale of timberland.

Holman Reply Brief, at 9-10 n.

Appendix A

The question of the first amendment protections due a news report of a copyrighted research report is a provocative one. Conflicts between interests protected by the first amendment and the copyright laws thus far have been resolved by application of the fair use doctrine. *E.g., Walt Disney Productions* v. *Air Pirates,* 345 F.Supp. 108, 115 (N.D.Cal. 1972); *McGraw-Hill, Inc.* v. *Worth Publishers, Inc.,* 335 F.Supp. 415, 422 (S.D.N.Y. 1971). Some day, legitimate in-depth news coverage of copyrighted, small-circulation articles dealing with areas of general concern may require courts to distinguish between the doctrine of fair use and "an emerging constitutional limitation on copyright contained in the first amendment." Nimmer, *Does Copyright Abridge The First Amendment Guarantees Of Free Speech And Press?* 17 U.C.L.A. L.Rev. 1180, 1200 (1970). *See* Patterson, *Private Copyright And Public Communication: Free Speech Endangered,* 28 Vanderbilt L.Rev. 1161 (1975). But, this is not the case.

[6-8] It is, of course, axiomatic that "news events" may not be copyrighted. *Time, Inc.* v. *Bernard Geis Associates,* 293 F.Supp. 130, 143 (S.D.N.Y. 1968). But in considering the copyright protections due a report of news events or factual developments, it is important to differentiate between the substance of the information contained in the report, *i.e.,* the event itself, and "the particular form or collocation of words in which the writer has communicated it." *International News Service* v. *Associated Press,* 248 U.S. 215, 234, 39 S.Ct. 68, 70, 63 L.Ed. 211 (1918); *see Chicago Record-Herald Co.* v. *Tribune Ass'n,* 275 F. 797 (7th Cir. 1921). What is protected is the manner of expression, the author's analysis or interpretation of events, the way he structures his material

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and marshals facts, his choice of words, and the emphasis he gives to particular developments. Thus, the essence of infringement lies not in taking a general theme or in coverage of the reports as events, but in appropriating the "particular expression through similarities of treatment, details, scenes, events and characterization." *Reyher* v. *Children's Television Workshop,* 533 F.2d 87, 91 (2d Cir. 1976). In a parallel manner, the essence or purpose of legitimate journalism is the reporting of objective facts or developments, not the appropriation of the form of expression used by the news source.

Here, the appellants did not bother to distinguish between the events contained in the reports and the manner of expression used by the Wainwright analysts. Unlike traditional news coverage, moreover, the Transcript did not provide independent analysis or research; it did not solicit comments on the same topics from other financial analysts; and it did not include any criticism, praise, or other reactions by industry officials or investors. Rather, the Transcript appropriated almost verbatim the most creative and original aspects of the reports, the financial analyses and predictions, which represent a substantial investment of time, money and labor.[3] *See* Gorman,

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[3] The extent of the copying is illustrated by the following comparison of the Transcript's abstracts, on the left, and portions of the Wainwright reports, on the right:

> ". . . 1976 prospects are strengthened by the magnitude of the increase in industrial and agricultural chemical earnings in last year's recessionary environment."
>
> "And second, he says that likely to aid comparisons this year was the surprisingly limited extent to which the Fiber Division's loss shrank last year."

(Footnote continued on following page)

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Copyright Protection For The Collection And Representation Of Facts, 76 Harv. L.Rev. 1569, 1578 (1963). *Cf.*

(Footnote continued from preceding page)

"His estimated earnings for 1976 is $3.76 per share compared with earnings of $3.24 per share in 1975."

"The first of the 'surprises' alluded to above that strengthens 1976 prospects is the magnitude of the increase in industrial and agricultural chemical earnings in last year's recessionary environment." (p. 1)

"The second development likely to aid comparisons this year was the surprisingly limited extent to which the Fiber Division's losses shrank last year. . . ." (p. 2)

"Earnings (Years ending Dec. 31)

. . . Actual 1975 ..... $3.24 per share(b)

Estimated 1976 ..... $3.75 per share(c)

* * *

"(b) including LIFO profit of 20 [cents] per share and 12 [cents] per share benefit of change in pension funding assumptions.

". . . one of the most hopeful developments in recent years was the decision by management last year to attempt to negotiate sale of the Fiber Division."

". . . the company could wind up with possibly $100 million, plus a tax writeoff and a sizable one-time charge against earnings."

". . . the company is now far enough along on the learning curve that additional cost overruns, if any, will be small, the major incremental financial cost to FMC will lie in the determination of what share of the present unreserved overrun is the company's responsibility."

(146a-147a).

(Footnote continued on following page)

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Note, *Beyond The Realm Of Copyright: Is There Legal Sanctuary For The Merchant of Ideas?*, 41 Brooklyn L. Rev. 284 (1974).

The copying by the Transcript is easily distinguishable from the reporting of the Wainwright research reports by other publications. The Wall Street Journal articles referred to by appellants, for example, were published a year apart. There apparently was no attempt to provide readers regularly with summaries of the Wainwright reports and there is no indication that the Wall Street Journal launched an advertising campaign portraying itself as a publisher of the same financial analyses available to large investors, but at a lower price. By contrast, the appellants' use of the Wainwright reports was blatantly self-serving with the obvious intent, if not the effect, of fulfilling the demand for the original work. *See Berlin* v. *E. C. Publications, Inc.,* 329 F.2d 541, 545 (2d Cir.), *cert. denied,* 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed. 2d 33 (1964). This was not legitimate coverage of a

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". . . one of the most hopeful developments at FMC in recent years was the decision reached by management late last year to attempt to negotiate sale of the Fiber Division. . . ." (p. 4)

". . . FMC would wind up with possibly $100 million, plus a tax writeoff and a sizable one-time charge against earnings." (p. 6)

". . . the company is now far enough along on the learning curve that additional cost overruns, if any, will be small, and that the major incremental financial cost to FMC will lie in the determination of what share of the *present* unreserved overrun is the company's responsibility." (p. 7)

news event; instead it was, and there is no other way to describe it, chiseling for personal profit.[4]

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[4] Section 107 of the revised Copyright Law, P.L. 94-553, effective January 1, 1978, provides that the fair use of a copyrighted work for such purposes as "news reporting" is not an infringement of the copyright. The factors to be considered in determining whether the use is a fair one include:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

Significantly, the legislative history of the revised law suggests that the defense of fair use should be restricted when material is appropriated from a "newsletter" for profit-making purposes:

> During the consideration of the revision bill in the 94th Congress it was proposed that independent newsletters, as distinguished from house organs and publicity or advertising publications, be given separate treatment. It is argued that newsletters are particularly vulnerable to mass photocopying, and that most newsletters have fairly modest circulations. Whether the copying of portions of a newsletter is an act of infringement or a fair use will necessarily turn on the facts of the individual case. However, as a general principle, it seems clear that the scope of the fair use doctrine should be considerably narrower in the case of newsletters than in that of either mass-circulation periodicals or scientific journals. The commercial nature of the user is a significant factor in such cases: Copying by a profit-making user of even a small portion of a newsletter may have a significant impact on the commercial market for the work.

H.R. No. 94-1476, 94th Cong. 2nd Sess. 73-74, *reprinted in* [1976] U.S. Code Cong. & Admin. News, p. 5687.

Thus, under Judge Lasker's well-reasoned fair use analysis, or, meeting the Transcript on its own ground, under a free speech theory, the appellants have failed to demonstrate that their use of the Wainwright reports either was reasonable or pursuant to legitimate news reporting that implicates first amendment interests.

Affirmed.

H. C. WAINWRIGHT & Co.,

Plaintiff,

v.

WALL STREET TRANSCRIPT CORPORATION and Richard A. Holman,

Defendants.

No. 76 Civ. 3053.

United States District Court,

S. D. New York.

Aug. 19, 1976.

Cahill, Gordon & Reindel, New York City, for plaintiff; Stephen A. Greene, Roy L. Regozin, Ira A. Finkelstein, Helene Fromm, New York City, of counsel.

Eaton, Van Winkle & Greenspoon, New York City, for defendants.

MEMORANDUM

Lasker, District Judge.

H. C. Wainwright & Co. is engaged in the securities business as a broker. As an important adjunct to its brokerage business, Wainwright has for nearly forty years provided financial research for its clients. The

roster of those it currently serves numbers more than 900 including most major banks, insurance companies, mutual funds, investment counselors, and pension funds in a variety of countries. 90% of Wainwright's revenues and even more of its profits are earned from the research which it retains a staff of 80 professionally trained persons.

Wainwright regularly furnishes its clients with detailed and analytical "Research Reports" relating to some 30 industrial areas and 275 industrial, financial, utility and railroad corporations which represent a "broad cross-section of the economy of the United States, and, as measured by capitalization, account for the bulk of the market value of a typical institutional equity portfolio."[1]

Wainwright copyrights each of its reports by registration with the Register of Copyrights, affixing the classic "copyright sign", its name and the year at the bottom of the first page of each report and adding the notice "All rights reserved. No portion of this report may be reproduced in any form without prior written consent." There is no doubt that if Wainwright's reports are copyrightable—a point which Wall Street Transcript Corporation questions—they have been copyrighted.

The Wall Street Transcript is published weekly. Among its features is the "Wall Street Roundup" which consists largely, if not exclusively, of abstracts of reports prepared by institutional and business researchers. It advertises itself to the financial world as a purveyor of institutional research reports in abstract form. The announcements appearing in the widely read and respected

[1] Affidavit of Robert L. Meyer, July 9, 1976.

Barron's for October 27, 1975 and July 5, 1976 are typical. They advise the reader that the Transcript will furnish him:

> "WHAT leading investment houses across the country are saying to their big institutional clients—the big banks, insurance companies, funds, and important foreign clients." (October 27, 1975) (Regozin Affidavit, Page 3)
>
> ". . . now you can read 1,000 pages of institutional research in 30 minutes! First thing each week, The Wall Street Transcript brings you a fast-reading, pinpointed account of heavyweight reports from the top institutional research firms.
>
> "Our Wall Street Roundup will save you hundreds of hours of reading; report to you the highlights of thousands of institutional-level research reports each year; and index every bit of it for you, immediately, for use whenever you want it. In addition, every account will give you full details as to who wrote the report, the date and the original length. . . ." (Regozin Affidavit, Page 2)

For several months[2] prior to the commencement of this suit, the Transcript has published a number of abstracts of Wainwright reports. These include the reports of FMC Corp., Overnite Transportation, Monsanto Company, Eastman Kodak, Polaroid Corporation and C.I.T. Financial Corporation. Promptly after learning of the

[2] It is not clear from the moving papers precisely when the Transcript first published abstracts of Wainwright's reports. The earliest date indicated is "May 1976". (Regozin Affidavit, Paragraph 5)

publications, Wainwright protested in writing to the Transcript that they violated Wainwright's copyrights. Counsel for the parties attempted responsibily but unsuccessfully to reach agreement as to their respective rights. This suit followed.

Wainwright claims that the publication of the Transcript constitutes actual or substantial copying of its reports in violation of 17 U.S.C. § 1 *et seq.,* as amended, (1970) and moves for a preliminary injunction restraining the Transcript from infringing Wainwright's copyrights. The Transcript argues that: 1) Plaintiff's research reports are not subject to copyright; 2) its abstracts furnish the public information which it has "a right to know", and that they are accordingly protected by the First Amendment; 3) Wainwright is not entitled to protection because by this suit it seeks to suppress "inside information" in violation of the rule established by such cases as *S.E.C.* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833 (2d Cir. 1968) and 446 F.2d 1301 (2d Cir. 1971), *cert. denied,* 404 U.S. 1005, 92 S.Ct. 561, 30 L.Ed.2d 558 (1972); and 4) under the doctrine of "fair use" the Transcript has the right to publish abstracts of Wainwright's reports. We find none of the Transcript's contentions to be sound and accordingly grant Wainwright's motion for preliminary relief.

I.

Citing such decisions as *Marvin Worth Productions* v. *Superior Films Corp.,* 319 F.Supp. 1269 (S.D.N.Y. 1970); *Norman* v. *Columbia Broadcasting System,* 333 F.Supp. 788 (S.D.N.Y. 1971) and *Dellar* v. *Samuel Goldwyn,* 150 F.2d 612 (2d Cir. 1945) the Transcript argues that:

> ". . . matter which lacks originality and [includes] facts as such are not copyrightable"

and adds

> "nor are plaintiff's conceptions, viewpoints or ideas embodied in its research report within the scope of copyright protection."

[1, 2] The difficulty with the Transcript's position is that the proposition of law which it states correctly does not apply to the facts of the case. Wainwright's reports, detailed excerpts of which appear below, clearly do not lack originality, and its original analyses and conclusions are without question entitled to copyright protection. The decisions on which the Transcript relies do not hold that such material may be freely copied, as the Transcript claims, but rather, as is explained in detail in part IV below, that a copyright does not grant its holder a monopoly of discussion of the underlying subject matter. Thus, for example, while an historian may not simply rewrite a copyrighted book, he is free to cover the same subject matter in a book growing out of his own independent research. The Transcript does not claim to have conducted any independent research in preparation of its abstracts. To the contrary, it blandly asserts the unsupportable proposition that ". . . independent work, if such be required, is the reading of the . . . Wainwright copyrighted report."[3] Such a theory, if validated, would make a shambles of the copyright law; copyright would dissolve upon the mere reading of the protected material, and protection would be a chimera. Neither the Constitution nor the statute contemplates such evanescent or worthless protection.

[3] Letter of Samuel M. Greenspoon, attorney for the Transcript, to the Court dated July 26, 1976.

[3, 4] Nor is there merit to the Transcript's subordinate arguments that Wainwright's reports do not meet the requirements of the statute because they are neither sold, nor works not reproduced for sale within the meaning of 17 U.S.C. § 12, or that they do not fall within "Class (a)" or 17 U.S.C. § 5 in which their certificates of registration classify them. The affidavit of Robert L. Meyer, a partner in Wainwright and its Director of Research, clearly establishes at Paragraphs 2-8 that furnishing the reports is part of the service for which Wainwright charges a cost to its clients. Moreover, the statute does not require a literal sale, but may be satisfied by a lease, loan or gift of the copyrighted materal. See, e.g., *Bartok* v. *Boosey & Hawkes, Inc.*, 523 F.2d 941, 945 (2d Cir. 1975). Even advertising handouts and illustrations in a catalogue are protected. *Bleistein* v. *Donaldson Lithographing Co.*, 188 U.S. 239, 23 S.Ct. 298, 47 L.Ed. 460 (1903); *Lin-brook Builders Hardware* v. *Gertler*, 352 F.2d 298 (9th Cir. 1965).

[5] There is no greater merit to the claim that the reports are not "books" within the meaning of subdivision (a) of 17 U.S.C. § 5. If they are not—and they appear to be in every respect except the most literal—they are "composite works" or "other compilations". Even greeting cards are registrable under Class (a), *Roth Greeting Cards* v. *United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970), as are machine-scorable answer sheets to tests. *Harcourt, Brace & World, Inc.* v. *Graphic Controls Corp.*, 329 F.Supp. 517 (S.D.N.Y. 1971). Moreover, the copyright office's grants of certificates of registration to the

plaintiff indicate that it construes the statute to cover the reports.

II.

[6] The Transcript asserts that it is a newspaper and that in furnishing its readers abstracts of business and industrial reports it is merely giving them the news. More particularly, it claims that the First Amendment, especially as its reach has been construed in the recent decisions of the Supreme Court in *Buckley* v. *Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) and *Virgina State Board of Pharmacy* v. *Virginia Consumer Council,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) assures the public's "right to know" the information contained in the Wainwright reports.

[7] The Transcript's ingenious designation of the reports as news is faulty. While the fact of Wainwright's issuing a report on a particular company or industry, and perhaps whether it was favorable or unfavorable, bullish or bearish, may be news, the precise contents of the report are not news—at least if the term is meant to indicate that the material, as is the case of true "news," is in the public domain. The original analytical contents, the style, impressions, estimates, assessments and appraisals of the reports are protected, as is the particular expression of the facts. The public has a right to know the facts, but does not have a right to know them in the particular form in which an author assembles and expresses them.

As to the Transcript's claim that the First Amendment protects the publication of its abstracts, one could dispose of the argument as Judge Croake did in *McGraw-Hill* v. *Worth Publishers Inc.,* 335 F.Supp. 415, 422 (S.D.N.Y. 1971) by saying:

> "Defendants' First Amendment argument, in so far as it is distinguishable from their claim of fair use, can be dismissed as flying in the face of established law. See U.S.Const. Art. 1, § 8; 17 U.S.C. §§ 1, *et seq.,* 112."

Judge Zampano put it nearly as concisely in *Robert Stigwood Group Ltd.* v. *O'Reilly,* 346 F.Supp. 376, 383 (D.Conn.1972) *aff'd,* No. 72-1826 (2d Cir., May 30, 1973):

> "The short answer to the defendants' absolutist approach to the meaning of the First Amendment is that it is simply not the law. Were the First Amendment to be applied literally, our statutes pertaining to perjury, obscenity, mail fraud, among many other, would constitutionally fall."

[8] A further comment is in order. The tension between the First Amendment and the copyright statute which the Transcript professes to discern in such cases as this does not exist. It does not exist because the doctrine of fair use, discussed below, has been precisely contoured by the courts to assure simultaneously the public's access to knowledge of general import and the right of an author to protection of his intellectual creation.

III.

[9] Relying solely on the decisions in *S.E.C.* v. *Texas Gulf Sulphur Co., supra,* the Transcript contends that "it is a violation of law to utilize insider information in such a way that the general public is excluded therefrom and only plaintiff's customers receive the benefits therefrom."

Appendix A

Even if this characterization of the *Texas Gulf* rule, a case relating only to the purchase of securities, were not over generalized, it would not be applicable to the case at hand.

In the first place nothing in the record supports the unfounded claim that inside information is used in preparation of or is included in the reports. The allegation of such use springs full blown from, and only from, the Transcript's memorandum in opposition, and is categorically denied in Wainwright's reply memorandum with references to Meyer's affidavit at Paragraph 10, which in turn refers to various reports which are exhibits to the complaint. Nothing contained in them appears to support the Transcript's claim and the Transcript has filed no affidavit on the motion, nor furnished any material controverting Wainwright's categorical denial of the use of inside information.

Furthermore, there is serious doubt whether, under the holding in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975) defendants have standing to assert the defense of the violation of the securities laws which they claim.

IV.

> "'Fair use' is a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner . . ." Ball, Copyright & Literary Property 260 (1944).

The Transcript's major position is anchored in the theory of fair use.

Appendix A

The leading case on the subject in this Circuit is *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966). There Judge Moore explained at page 307 that:

> "The fundamental justification for the privilege lies in the constitutional purpose in granting copyright protection in the first instance, to wit, 'To Promote the Progress of Science and the Useful Arts' U.S.Const. Art. 1 § 8. (Citations omitted) To serve that purpose, 'courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry' *Berlin* v. *E. C. Publications, Inc.*, 329 F.2d 541, 544 (2d Cir. 1964)."

[10] The classic instances in which courts have permitted authors to use excerpts from a copyrighted work without the consent of the copyright owner are those of literary criticism and parody of the copyrighted work, history and biography.

> "The cases and commentaries attempting to define the quicksilver content of 'fair use,' although varying and overlapping in their definitions, appear to agree that at least four tests are appropriate to determine whether the doctrine applies: (1) Was there a substantive taking, qualitatively or quantitatively? (2) If there was such a taking, did the taking materially reduce the demand for the original copyrighted property? (3) . . . [D]oes the distribution of the material serve the public interest in the free dissemination of information? And (4) does

the preparation of the material require the use of prior materials dealing with the same subject matter." *Marvin Worth Productions* v. *Superior Films Corp.*, 319 F.Supp. 1269, 1275 (S.D.N.Y. 1970).[4]

---

[4] Similar factors, declared to be a codification of existing law are included in § 107 of the S. 1361, The General Revision of the Copyright Law pending before Congress. They are:

1) the purpose and character of the use;

2) the nature of the copyrighted work;

Abstract

". . . 1976 prospects are strengthened by the magnitude of the increase in industrial and agricultural chemical earnings in last year's recessionary environment."

3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

4) the effect of the use upon the potential market for or value of the copyrighted work.

"And second, he says that likely to aid comparisons this year was the surprisingly limited extent to which the Fiber Division's losses shrank last year."

* * *

". . . one of the most hopeful developments in recent years was the decision by management last year to attempt to negotiate a sale of the Fiber Division."

". . . the company would wind up with possibly $100 million, plus a tax writeoff and a sizeable one-time charge against earnings."

". . . the company is now far enough along on the learning curve that additional cost overruns, if any, will be small, the

(Footnote continued on following page)

(Footnote continued from preceding page)

major incremental financial cost to FMC will lie in the determination of what share of the present unreserved overrun is the company's responsibility."

* * *

"Trantum estimates that Overnight Transportation will earn $3 a share this year, compared with $2.03 in 1975 and $2.78 in 1974."

* * *

"Productivity gains are being realized, he believes, and a favorable earnings trend should be maintained this year, with additional gains in 1977 as a result of recent additions to route authority and plans for developing new business between Ohio and the Southeast."

"As for the longer term, Trantum says management must take several steps to improve its uneven earnings performance since 1971. He says it must expand its operating authority to cut its dependence on the Southeast, put greater stress on sales and refine and tighten its system of revenue and expense controls."

"Trantum says progress is apparently taking place in all three areas, but he says it's too early to define the effects of the company's actions on long-term prospects."

Special Reports

"The first of the 'surpris s' alluded to above that strengthen 1976 prospects is the magnitude of the increase in industrial and agricultural chemcial earnings in last year's recissionary environment." (p. 1)

"The second development likely to aid comparisons this year was the surprisingly limited extent to which the Fiber Division's losses shrank last year. . . ." (p. 2)

* * *

(Footnote continued on following page)

Appendix A

(Footnote continued from preceding page)

". . . one of the most hopeful developments at FMC in recent years was the decision reached by management late last year to attempt to negotiate sale of the Fiber Division. . . . (p. 4)

". . . FMC would wind up with possibly $100 million, plus a tax writeoff and a sizeable one-time charge against earnings." (p. 6)

". . . the company is now far enough along on the learning curve that additional cost overruns, if any, will be small, and that the major incremental financial cost to FMC will lie in the determination of what share of the *present* unreserved overrun is the company's responsibility." (p. 7)

* * *

"Earnings (Years ending Dec. 31)

Actual 1974 .....$2.78 per share

Actual 1975 .....$2.03 per share

Estimated 1976 .....$3.00 per share (p. 1)

* * *

"Productivity gains are finally being realized. . . . Furthermore, with the recent additions of route authority and the planned development of new business between Ohio and the Southeast, the carrier should be positioned to extend the favorable earnings trend into 1977." (p. 1)

"Before Overnite can be expected to significantly improve on uneven earnings performance since 1971, this analyst believes it necessary for management to take several steps: (1) expand operating authority to reduce dependence on the Southeast, (2) place greater emphasis on sales, and (3) refine and tighten the company's system of revenue and expense controls." (p. 1)

(Footnote continued on following page)

Appendix A

[11] Judged by these criteria the Transcript's abstracts do not constitute a fair use of Wainwright's reports. The takings have been substantial in quality, and absolutely, if not relatively substantial in quantity. Compelled by their very raison d'etre to present the *essence* of the Wainwright reports the Transcript abstracts suck the marrow from the bone of Wainwright's work without even the assertion of any independent research by the Transcript. There is, by the nature of an abstract, a special concentration on analyses, projections and conclusions: the elements of greatest value. Moreover, while the takings are not great in relation to the length of the reports they are nevertheless absolutely substantial in quantity.

The following examples are typical of the takings, and illustrate particularly well the remarkable extent of copying:

There is every reason to believe that the publication of the extracts may materially reduce the demand for Wainwright's services. Furnishing its reports to its clients is an especially valued feature which distinguishes Wainwright's services from other brokers'. The Transcript's infringements impair the value of Wainwright's copyrighted material by making its contents available to other brokerage houses with which Wainwright competes. Moreover the infringements impair Wainwright's ability to publish its own abstracts or to authorize others to do so.

(Footnote continued from preceding page)

"While progress is apparently being made in all three areas, it is still too early to precisely define the effects of these actions on the long-term outlook." (p. 1)

(Regozin Affidavit, Pages 8-11)

Nor is the distribution of the abstracts necessary to serve the public interest in the free dissemination of information. There is no question here of denial of public access. The Transcript is free to prepare and issue its own reports based on its own research and without use of copyrighted material. However, "[t]he second . . . publisher cannot bodily appropriate the research of its predecessor." *Rosemont Enterprises Inc.* v. *Random House Inc., supra*, at 310; and "No public need appears which would justify defendants' saving themselves time and trouble at the expense of plaintiffs' copyright." *Marvin Worth Productions* v. *Superior Films Corp., supra,* at 1275.

Finally, while the preparation of the Transcript's material may "require the use of prior materials dealing with the same subject," such a need frees the Transcript to get such prior materials from the source only—that is, to do its own research—not to lift passages wholesale from Wainwright's independent product under the guise of merely repeating facts or business terms or furnishing news to the public.

In sum, the Transcript's copyings are not protected as fair use of the material.

[12] The true nature of the Transcript's abstracts is that of a derivative work. Derivative works are an approved genre under 17 U.S.C. § 7, but may be copyrighted or published only with the consent of the publisher of the underlying work, which of course has not been given here.

V.

Wainwright has without question made a prima facie showing of infringement of its copyright. The defenses

asserted by the Transcript have not been established. In the circumstances Wainwright is entitled to a preliminary injunction to protect its copyrighted property and to shield it from the unmeasurable consequential damage to its brokerage business which could flow from making the contents of its research reports known without cost to competitors, potential clients and the public.

This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law.

The motion for preliminary injunction is granted and a decree is being filed concurrently with the filing of this Memorandum Opinion.

Appendix A

Order on Petition for Rehearing

UNITED STATES DISTRICT COURT
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 16th day of August, one thousand nine hundred and seventy-seven

Present:

HON. HAROLD R. MEDINA
HON. JAMES L. OAKES
Circuit Judges
HON. JACOB MISHLER
District Judge

76-7468

WAINWRIGHT SECURITIES, INC.,
Plaintiff-Appellee,
v.
WALL STREET TRANSCRIPT CORP. and RICHARD A. HOLMAN,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the defendants-appellants

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

Appendix A

Superseding Preliminary Injunction, Dated October 12, 1976

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

The Court entered a Preliminary Injunction in this action on August 20, 1976 and defendants filed motions for reargument and for modification of the terms of such Preliminary Injunction on August 30, 1976. The Court having considered the aforesaid motions, the affidavits of Richard A. Holman and Myron Kandel and the memorandum of law submitted by defendants in support of their motion for modification and their motion for reargument, respectively, and the affidavits of Robert L. Meyer and Roy L. Regozin and the memorandum of law submitted by plaintiff in response thereto and having heard counsel for the defendants and counsel for the plaintiff concerning the manner in which the Preliminary Injunction should be modified, and it appearing to the Court after due deliberation that it would be appropriate to modify and clarify in certain respects the provisions set forth in the Preliminary Injunction previously entered herein and to restate its terms in their entirety, and it still appearing to the Court after due deliberation that plaintiff has established a prima facie case that defendants have infringed plaintiff's copyrights in its Research Reports and that there is a substantial risk that defendants unless restrained will continue to do so during the pendency of this action, to the irreparable injury of the plaintiff, and that the issuance of this order will not irreparably injure defendants, and the Court having determined that there is no need to modify in any respect its findings of fact and conclusions of law set forth in its Memorandum Opinion previously filed herein, it is

ORDERED, that defendants, their officers, agents, servants, employees and attorneys, and all persons acting in concert with them or on their behalf, be and they hereby are restrained and enjoined, pending the determination of this action, from:

(a) publishing, selling, marketing or otherwise disposing of any copies of the abstracts of plaintiff's copyrighted Research Reports set forth on pages 43,669, 43,689, 43,789, 43,845 and 44,163 of the May 10, May 17, May 24, May 31 and July 5, 1976 issues of *The Wall Street Transcript,* respectively; and

(b) publishing, selling, marketing or otherwise disposing of any copies of any other abstracts of any of plaintiff's copyrighted Research Reports presented in the format of the feature "Wall Street Roundup" of *The Wall Street Transcript*; and it is further

ORDERED, that defendants, their officers, agents, servants, employees and attorneys, and all persons acting in concert with them or on their behalf, be and they hereby are restrained and enjoined, pending the determination of this action, from selling, circulating or otherwise disposing of any copies of the May 10, May 17, May 24, May 31 and July 5, 1976 issues of *The Wall Street Transcript* unless, prior to any such distribution of any such copy of any such issue, the abstract of plaintiff's copyrighted Research Report contained therein on page 43,669, 43,689, 43,789, 43,845 and 44,163 thereof, respectively, is inked out or otherwise rendered illegible in its entirety, and defendants shall provide written instructions to this effect to their personnel having access to copies of such issues and

shall post copies of such instructions in prominent places in the area or areas in which copies of such issues are stored by or on behalf of defendants and in the area or areas in which copies of back issues of *The Wall Street Transcript* are prepared for delivery or mailing by or on behalf of defendants; and it is further

ORDERED, that plaintiff shall file within five days from the date of entry hereof and keep in full force and effect a bond or bonds in the total sum of $5,000, conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained hereby; and it is further

ORDERED, that upon entry of this Preliminary Injunction, the Preliminary Injunction entered herein on August 20, 1976 shall have no further force or effect.

Dated: New York, New York
October 12, 1976

s/ MORRIS E. LASKER
U. S. D. J.

APPENDIX B

United States Constitution

Amendment I

82nd Congress Senate Document 170, p. 40

Congess shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article I, Section 8, Clause 8

The Congress shall have Power . . .

"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;"

90 Stat 2546 (1976)
17 U.S.C. §107

"Notwithstanding the provisions of Section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching, (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

"(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

"(2) the nature of the copyrighted work;

"(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

"(4) the effect of the use upon the potential market for or value of the copyrighted work."

70 Stat 63 (1956)
17 U.S.C. §13

"After copyright has been secured by publication of the work with the notice of copyright as provided in section 10 of this title, there shall be promptly deposited in the Copyright Office or in the mail addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, or if the work is by an author who is a citizen or subject of a foreign state or nation and has been published in a foreign country, one complete copy of the best edition then published in such foreign country, which copies or copy, if the work be a book or periodical, shall have been produced in accordance with the manufacturing provisions specified in section 16 of this title; or if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution; or if

the work belongs to a class specified in subsections (g), (h), (i) or (k) of section 5 of this title, and if the Register of Copyrights determines that it is impracticable to deposit copies because of their size, weight, fragility, or monetary value he may permit the deposit of photographs or other identifying reproductions in lieu of copies of the work as published under such rules and regulations as he may prescribe with the approval of the Librarian of Congress; or if the work is not reproduced in copies for sale there shall be deposited the copy, print, photograph, or other identifying reproduction provided by section 12 of this title, such copies or copy, print, photograph, or other reproduction to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with."

APPENDIX C

Excerpt from the Wall Street Journal, June 30, 1977
Page 35

"Analyst's Lowered Forecast of Chrysler Profit Widens Opinion Gap Over Outlook for Firm
By Charles J. Elia"

• • •

"Yesterday, Wainwright Securities weighed in with a 1978 forecast that is probably the lowest on the Street. It was Wainwright's second report to clients this week on Chrysler. On Monday, analyst Harvey E. Heinbach reduced his second quarter and full-year 1977 estimates, placing them among the Street's lowest, citing reasons that went beyond strike effects.

Mr. Heinbach is estimtting second quarter net at $1.50 to $1.75 a share, which he considers "rather disappointing," and full1year 1977 net at $5.25, down from an earlier estimate of $5.50.

The Wainwright analyst's 1978 estimate, made in a capsule report to the firm's clients yesterday, is $3 a share.

Excluding extraordinary tax credits, Chrysler earned $5.45 a share last year, compared with a deficit equal to $3.67 a share in 1975. A few other analysts' 1977 estimates are in the range Mr. Heinbach is using, but others are closer to the $5.90-$6 area.

Mr. Heinbach's 1978 estimate widens an already broad gap among Street analysts, who are currently looking for earnings ranging anywhere from $4.25 a share to $7 or more.

• • •

Appendix C

Wainwright's Mr. Heinbach thinks the company "will be hard-pressed just to match the third quarter 1976 profits" because he expects world-wide production to decline 5% to 6% from a year earlier.

He also is reluctant to accept Chrysler's mid-June assessment that strikes penalized the current quarter's earnings 50 to 55 cents a share. "Our own calculations suggest that strikes may have cost close to 25 cents a share, indicating that earnings would be down even without the strikes," he says.

"Chrysler's real problem is loss of market share in the domestic auto area," says Mr. Heinbach. He expects Chrysler to register only "minimal" volume improvement this year, "meaning that cost pressures will intensify relative to 1976, when major volume and productivity gains were realized," he says.

"Based on a relatively pessimistic economic overview, calling for real gross national product growth of 3%, we look for 1978 auto industry sales to slip 4% to 10.7 million units," Mr. Heinbach says.

"Thus, while it's expected that Chrysler's market share will show some recovery on the strength of its initial entry into the subcompact car market, world-wide factory sales may show no progress at all. Assuming intensified cost pressures and no product mix benefits, 1978 earnings are projected to fall off substantially."

Beyond 1978, the Wainwright analyst says his cash-flow projections for the company indicate to him that Chrysler will have to hold its capital and tooling expenditures per unit "well below" those of Ford and General Motors, confronting it with a competitive disadvantage. . . ."